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No. 80-2193

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARL F. PAGE, PETITIONER

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT E. KOPP
MARLEIGH D. DOVER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals properly held that petitioner had failed to prove employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1-59) is reported at 645 F. 2d 227. The original panel opinion of the court of appeals (Pet. App. 60-111) and the opinion of the district court (Pet. App. 112-144) are not reported.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on April 2, 1981. The petition for a writ of certiorari was filed on June 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Carl F. Page, a black supervisory employee of the United States Postal Service at Richmond, Virginia, commenced this employment discrimination action in the United States District Court for the Eastern District of

Virginia on July 18, 1977, challenging the Postal Service's failure to select him for two higher level positions, allegedly in violation of Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (Pet. App. 113-114).

Essentially, Mr. Page's claim of discrimination rested on the Postal Service's alleged failure to follow a provision of its Personnel Handbook (issued as part of an affirmative action program) requiring that "every effort" be made to include a minority or woman member on all promotion panels.[1] The panels that evaluated candidates for the two positions sought by petitioner did not include minority or female members.[2] The panels found that petitioner was "qualified" for both promotions, but the white males who were eventually selected for these positions were rated "most qualified" by these panels.

2. After a trial de novo, the district court entered judgment for the Postal Service (Pet. App. 113-144). The district court concluded that petitioner had established a prima

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[1] § 544.2 of the Personnel Handbook provides (Pet. App. 63):

> Review committee members must be at an organizational or grade level equal to or higher than that of the vacant position. The official who designates a review committee is responsible for making every effort to select at least one woman and/or one minority group member. In the absence of available women and/or minority employees at the appropriate level, committee members must be furnished by the next higher organizational unit, where available.

[2] Following his non-selection for the first promotion, petitioner filed an administrative charge of employment discrimination. During an interview for the second promotion, one of the panel members questioned petitioner about this charge. Based on those questions, petitioner filed a second charge, requesting the convening of a new panel that would include a minority member. Although the Postal Service had arranged to have a black supervisor from Philadelphia sit on this final panel, this individual had a scheduling conflict at the last moment, and a white male was substituted (Pet. App. 6-9).

facie case of employment discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), but concluded that the Postal Service had rebutted the prima facie case through the testimony of the panel members, who testified that they had not discriminated against petitioner because of his race, as well as through independent evidence of the applicants' relative qualifications, which showed that the panels had legitimate nondiscriminatory reasons for ranking the prevailing white applicants above petitioner (Pet. App. 131-143). The district court also determined that "[t]he weight of the evidence does not suggest pretext or sham masking a racial motivation" (*id.* at 143). Concluding that the Postal Service had failed to find a minority member to serve on the last panel only after having made every effort to do so, the district court held that the "lack of a minority member must be weighed against the proper questions asked the applicants, the obvious concern by the Committee members for the applicants' ability to do the job, and the lack of bias on the part of the Committee members" (*id.* at 142-143).

3. On appeal, a panel of the Fourth Circuit reversed by divided vote, holding that the Postal Service had failed, under *McDonnell Douglas Corp.* v. *Green, supra*, to rebut the prima facie case established by petitioner because the Postal Service had not articulated some legitimate, nondiscriminatory reason for petitioner's rejection (Pet. App. 60-111). The panel held that the reason articulated by the Postal Service—that petitioner was not rated "most qualified" by the review committee—was not a legitimate one because the committees that made those evaluations were not constituted in accordance with the Handbook's affirmative action provision. The Postal Service sought rehearing en banc on the ground that the panel had erroneously confused a technical defect in the decision-making process with discrimination, thus making any failure to follow every

detail of affirmative action guidelines conclusive of discrimination in promotion.

4. The petition for rehearing en banc was granted, and the court of appeals, by divided vote, affirmed the district court's holding that the Postal Service had articulated legitimate nondiscriminatory reasons for its failure to promote petitioner, who had then failed to show that those reasons were a pretext for unlawful discrimination (Pet. App. 20-21). The court of appeals noted that once an employee establishes a prima facie case, and raises the inference of a discriminatory motive for denying the promotion, the employer must articulate a legitimate nondiscriminatory reason for the employment decision. The court of appeals found (*id.* at 12) that the district court had not erred in concluding that the Postal Service had dispelled the inference of discrimination through the testimony of the committee members, who stated that they did not discriminate against petitioner, but simply considered him less well-qualified than the successful applicants. The court of appeals stated (*id.* at 12-14; footnote omitted):

> Obviously, it must be possible for the employers legally to make employment decisions that disfavor qualified minority employees on the basis of a comparative evaluation of their qualifications with those of other applicants. Concededly, when that evaluation is to any degree subjective and when the evaluators are themselves not members of the protected minority, the legitimacy and nondiscriminatory basis of the articulated reason for the decision may be subject to particularly close scrutiny by the trial judge. But, as the Supreme Court pointed out in *McDonnell Douglas* itself, the mere fact that subjective criteria are involved in the reason articulated by an employer does not prevent according it sufficient rebuttal weight to dispel the inference of discrimination raised by the prima

> facie case. [411 U.S.] at 803. Here, aside from the testimony--obviously credited by the district judge--of the persons who actually made the promotion decisions that they were not racially motivated, there was objective evidence supporting the comparative evaluation they made.

The court of appeals also found that the Postal Service's alleged failure to follow its Personnel Handbook by failing to include a minority or female member on the committee was properly addressed as part of the pretext inquiry. The court further found that the district court did not err in concluding that there were no minorities or women qualified to sit on the promotion panel at the critical time (Pet. App. 17-18) and therefore upheld the lower court's finding that "the articulated reason of better relative qualification was not a mere pretext" (*id.* at 18). Thus, the court of appeals specifically rejected, as an erroneous departure from settled and fundamental Title VII principles, petitioner's contentions that: (1) the Postal Service was required, for purposes of rebutting petitioner's prima facie case, to articulate a legitimate nondiscriminatory reason for the absence of a minority review committee member, and (2) the pretext inquiry should focus on this reason, rather than on the articulated reason for denying the promotion (*id.* at 22-24). The court stated (*id.* at 27-29):

> The proper object of inquiry in a claim of disparate treatment under § 717 is whether there has been "discrimination" in respect of "*personnel actions* affecting [covered] employees or applicants for employment * * *." 42 U.S.C. § 2000e-16(a) (emphasis added). Disparate treatment theory as it has emerged in application of this and comparable provisions of Title VII, most notably § 703(a)(1) * * *, has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment

decisions such as hiring, granting leave, discharging, promoting, and compensating. This is the general level of decision we think contemplated by the term "personnel action" in § 717. It is the level focused upon in the major Supreme Court decisions establishing and refining the substantive and procedural elements of individual disparate treatment history. *See e.g., Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24, 24-25 & nn. 1 & 2 (1978) (failure to promote); *Furnco*, 438 U.S. at 576-77 & n.8 (failure to hire); *McDonnell Douglas*, 411 U.S. at 802 (same). *See also* B. Schlei & P. Grossman, *Employment Discrimination Law* 15 (1976). It is the level upon which the district court in the instant case--with the acquiescence there of both parties--focused the *McDonnell Douglas* analysis.

Finally, the court of appeals also noted that the court and the parties had agreed below that the "personnel actions" at issue were the decisions denying petitioner the promotions and that the case was litigated accordingly (Pet. App. 29).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Both courts below correctly held that the Postal Service had rebutted petitioner's prima facie case of discrimination.[3] This Court first considered the allocation of burdens and the order of presentation of proof in cases under Title VII in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792

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[3]We assume, for purposes of argument, that petitioner established a prima facie case, based, *inter alia*, on the Postal Service's deviation from Handbook procedures. The mere showing that he was a member of a racial minority and one of the applicants qualified for promotion would not constitute a prima facie showing of discrimination. See our petition in *United States Postal Service* v. *Aikens*, cert. granted and judgment vacated, No. 80-1737 (June 29, 1981).

(1973). The Court there held that if a plaintiff succeeds in proving a prima facie case the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the employment decision (*id.* at 802). If the defendant carries this burden, the plaintiff must then be afforded an opportunity to prove, by a preponderance of the evidence, that the reasons articulated by the employer were merely a pretext for discrimination (*id.* at 804).

In *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764 (Mar. 4, 1981), slip op. 6, this Court further explained the employer's rebuttal burden, holding that the employer must "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." The Court thus rejected the Fifth Circuit's view in that case that the employer must prove the absence of discrimination by a preponderance of the evidence. As to pretext, this Court explained (slip op. 7) that "[t]his burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination. [The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

Here, the district court credited the Postal Service's evidence that there were legitimate nondiscriminatory reasons for ranking the successful white applicants above petitioner. The district court therefore found that the Postal Service had rebutted petitioner's prima facie case, and that petitioner had failed to establish that these reasons were merely pretextual. The court of appeals properly upheld these determinations, and the decisions below are fully consistent with the standards previously established by this Court.

2. Petitioner nevertheless contends that he is entitled to relief merely because the Postal Service failed to adhere strictly to every detail of its affirmative action guidelines. Petitioner brought suit for promotion discrimination, however, and the courts below correctly found that the Postal Service's failure to constitute the review committees in strict compliance with the Personnel Handbook had not affected the ranking of the applicants, and thus did not affect the ultimate promotion decisions.

In attempting to shift the burden of inquiry on the failure to promote from the decision itself to the composition of the committees, petitioner rests his argument on the erroneous assumption that he was the victim of a discriminatory failure to promote merely because the promotion panels were not properly constituted. However, there is no logical basis for concluding the decisions not to promote were necessarily discriminatory simply because there was some technical defect in the decision-making process. See *Kennedy* v. *Landon*, 598 F. 2d 337 (4th Cir. 1979); cf. *Gillin* v. *Federal Paper Board Co.*, 479 F. 2d 97 (2d Cir. 1973). Where, as the district court found here, the committees did not base their decisions on any improper criterion such as race, petitioner could not have been denied a promotion in violation of Title VII. Noting that Section 717(a) of Title VII, 42 U.S.C. 2000e-16(a), in terms prohibits discrimination in respect of "personnel actions affecting employees or applicants for employment," the court of appeals properly held (Pet. App. 27-28) that the focus of inquiry should be on the "ultimate employment decision[]."

At bottom, petitioner's contentions amount to a disagreement with the district court's factual findings—that is, that the committees made a nondiscriminatory selection. As such, and in light of the court of appeals' concurrence in those findings, petitioner's contentions warrant no further

review. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT E. KOPP
MARLEIGH D. DOVER
Attorneys

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